IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union has engaged solely in the defense of the Bill of Rights for more than forty-five years. Much of its energies have been directed towards increasing the standards of fairness in the administration of the criminal law.

Without a fair trial for the accused, the criminal law has no meaning. The American Civil Liberties Union believes that television coverage of trials within the courtroom adversely affects the administration of justice and denies the accused a fair trial and therefor deprives him of due process of law. Our reasons are set forth in this brief.[1]

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[1] The attorneys for both parties have consented to the filing of this brief. The letters of consent are on file with the Clerk.

Statement of the Case

Petitioner was tried and convicted for swindling under Title 17, Chapter 16 of the Texas Penal Code on a count which charged that, by means of false pretenses and devices and fraudulent representations, petitioner induced one T. J. Watson to deliver an instrument to him valued at more than $50.00.

From the outset the proceedings were televised live, the trial court overruling petitioner's constitutional objection to television coverage. Following conviction, petitioner appealed to the Texas Court of Criminal Appeals, which affirmed on January 15, 1964, specifically deciding the question of the constitutionality of the television trial. That court subsequently overruled two separate motions for rehearing. This Court granted certiorari on December 7, 1964, limited to the question:

> Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.

ARGUMENT

I.

Live television coverage of petitioner's trial deprived him of a fair hearing and denied him due process of law.

Strict compliance with the basic elements of a fair trial is essential to due process. Indeed, as Mr. Justice Black stated in *In Re Murchison*, 349 U. S. 133, 136 (1955), "our system of law has always endeavored to prevent even the *probability* of unfairness." (Emphasis added)

This insistence upon a fair trial was reaffirmed in a recent series of cases revealing the Court's deep concern with the inherently prejudicial effects of widespread news publicity on the outcome of a trial. In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), the defendant's out of court "confession" had been telecast three times to the community in which he was tried. The Court reversed the conviction without reviewing the voir dire examination of the jurors, holding that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." 373 U. S. at 726. *Rideau* thus departed from the approach of the earlier cases of *Stroble* v. *California*, 343 U. S. 181 (1952) and *Irvin* v. *Dowd*, 366 U. S. 717 (1961), where the Court carefully examined the record to determine whether the pre-trial newspaper releases had in fact influenced the outcome of the trial, so finding in *Irvin* but not in *Stroble*. In *Rideau* it was properly recognized that prejudice was inherent in the widespread nature of the television publicity.

In this case it is even clearer that a fair trial was out of the question because the extensive live telecasting im-

peded a purposive, solemn search for the truth and injected into petitioner's trial matter not properly before the court. Its effect was far more subtle and insidious than that involved in the earlier cases. For here the publicity was felt at the time of maximum sensitivity, during the trial itself, and was far more pervasive, since not limited to particular prejudicial items.

Moreover, the earlier cases dealt with the significantly different problem of pre-trial publicity *outside* the control of the court. Because such publicity is inevitable (*Irvin* v. *Dowd, supra* at 722), and cannot be effectively curtailed by the court short of holding the news media in contempt, the efficient administration of justice demands that a petitioner demonstrate with some certainty that the publicity affected the outcome of the trial. But where a court can eliminate this substantial threat to a fair trial simply by barring telecasting of the proceedings, it is unconscionable for a defendant to be exposed to such intensive publicity.

The federal courts have adopted the policy of Canon 35 of the American Bar Association and absolutely barred television from the courtroom (Fed. R. Crim. Proc. 53) and most states have arrived at a similar conclusion. These decisions reflect a mature awareness that a telecast trial cannot be fair. The Court should now apply the due process clause of the Fourteenth Amendment to invalidate all convictions obtained in the inherently prejudicial atmosphere created by television.

A. *The presence of television in the courtroom created an atmosphere that made it impossible to conduct a fair trial.*

In allowing the proceedings to be televised, the trial judge lost sight of the admonition that "a courtroom is a place for ascertaining the truth in controversies among

men, and has no other legitimate function." Griswold, The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered, 48 A. B. A. J. 615 (1962). The record makes clear that the presence of television diverted the participants from their sole function of presenting, weighing and passing upon the evidence pertaining to petitioner's guilt or innocence.

From the very outset it was obvious that the trial was being televised. Indeed, the sole issue before the court the first two days of the hearing, September 24 and 25, was the propriety of television in the courtroom. The proceedings of the first day were televised live and repeated on tape later that evening in lieu of the usual late night movie (R. 58), reaching an estimated one hundred thousand local viewers, as well as a potential network audience in the millions. (R. 45, 89) It is plain that potential jurors and witnesses were exposed to those telecasts and indelibly impressed with the fact of television coverage of the hearing. An inquiry on the voir dire or at the trial as to whether these participants were aware that the proceedings were being telecast would of course have been futile, serving only to emphasize the television coverage. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 916 (1950) (dissenting opinion of Frankfurter, *J.*).

The New York Times described the courtroom on the opening day of trial:

> A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates.
>
> A microphone stuck its 12 inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted

Judge Dunagan on his bench. Cables and wires snaked over the floor. (New York Times, September 25, 1962.)

That this was a correct account of conditions, which continued substantially unchanged the following day, is demonstrated by the record. (R. 41, 42, 43, 47, 48, 49) There is plainly nothing to the argument that telecasting techniques are so far perfected that coverage of a trial can go unnoticed.

Both petitioner, who arrived in court the first day of the proceedings (R. 39), and the jurors, who were sworn in the second day (R. 57), were exposed to this chaos in the courtroom. Although conditions were substantially improved when the hearing resumed on October 22 (see, e.g., R. 66-69), the point had already been driven home that the proceedings would be on the air. For the following reasons the net effect was to interfere completely with the sober search for truth that characterizes a fair trial.

1. The trial judge was forced to devote an unduly large portion of his time and attention to keeping the situation within manageable bounds. Accordingly, he announced no less than ten separate rulings on television coverage during the trial. (R. 34-37, 55-56, 57, 61, 73-74, 103-106, 107, 112, 131, 134-135) Many of these determinations were quite extensive, occupying over a full page in the record, and were of considerable difficulty (R. 34-37). The judge's rulings are the best testimonial to the demands imposed on him: no newsmen behind the bar (R. 35), control camera noise (R. 35), no photographing on second floor (R. 36), officers to enforce these orders (R. 36), identifying badges to be carried but not worn (R. 36-37), "working area" off-bounds to television personnel (R. 55-56), remove cameras to booth (R. 61), no flash bulbs or floods, no cameras in ante-room (R. 61), cease sound coverage (R. 131), no

tape of interrogation of jury or taking of testimony (R. 131), no photographing of defendant's attorneys (R. 134-135).

Plagued by the need to control broadcasters, it is obvious that a judge cannot devote adequate attention to the conduct of the trial. As the Chairman of the American Bar Association's Committee on Public Relations has warned, burdening a judge with responsibility for supervising television personnel must make him "a harassed magistrate." Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A. B. A. J. 843, 845 (1956).[2] A fair trial for criminal defendants is simply not possible under such circumstances.

2. Television in the courtroom makes difficult, if not impossible, an effective presentation of evidence. Not only is the paraphernalia in the courtroom bound to divert the witness, but the prospect of a vast audience observing him is likely to heighten his discomfort. These factors convinced one court not to hold in contempt a witness who refused to appear before televised hearings of the Kefauver committee: "The concentration of all these elements seems . . . necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous." *United States v. Kleinman*, 107 F. Supp. 407, 408 (1952).

Some witnesses may be deterred from giving a complete presentation of testimony by the fear of embarrassment by

[2] Dean Griswold believes that the judge should be denied all discretion to grant permission to televise trials in order to insulate him from the requests of the news media and from political pressures. This risk is especially great in states in which a judge must run for re-election, since coverage of his trials would provide him with much publicity. Griswold, *supra* at 616-17. This does not mean that a judge's rulings at a televised trial must reflect public sentiment; it does indicate that the decision to allow broadcasting coverage may be based on considerations irrelevant to the demands of a fair trial or the needs of a free press.

widespread telecasting of their statements.[3] See Pye, The Lessons of Dallas—Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference, March 19-20, 1964, p. 11. Others may allow their theatrical flair to come to the fore and "ham it up" for the television viewers. See Griswold, *supra* at 618. The argument often made in support of television coverage of trials that there is no way of determining just what effect the camera will have on a particular witness, see e.g., Wiggins, Should Canon 35 Be Amended? A Newspaperman Speaks for the News Media, 42 A. B. A. J. 838, 841, 842 (1956), merely reinforces the need to bar all television from the courtroom.

The television camera may inhibit testimony which offends prevailing public sentiment. Consider, for example, the reluctance of a witness in a case involving an explosive racial issue to testify for the "wrong" side before an entire community of television viewers. Indeed, in the present case a considerable amount of public opinion had already formed that could affect the testimony of a less than courageous witness. For similar reasons, this Court has always been careful to insulate judicial trials from the pressure of public opinion. See *Frank* v. *Mangum*, 237 U. S. 309 (1915); *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Shepherd* v. *Florida*, 341 U. S. 50 (1951) (concurring opinion).

3. If the defendant takes the stand, the unnecessary added burden of exposure to a television audience will un-

[3] It appears from a press release incorporated into the record (R. 10-11) that the trial judge did not permit television coverage of testimony. However, on October 23, the judge proscribed *further* sound coverage of testimony, suggesting that until that time there had been telecasting of witnesses. While some of the dangers involved at a televised trial may be mitigated by a rule forbidding the televising of witnesses, the mere fact of the trial being covered probably will still have a substantial effect on individuals giving testimony.

doubtedly affect his testimony adversely. Even if he does not take the stand, he is in constant view of the jurors, who may take his discomfort for an indication of guilt rather than the result of inordinate publicity upon him. The predicament has been well stated:

> The agitation of the accused is keen enough without imposing upon him the additional burden of a psychological torture not unlike the third degree. It is unjust to demand of an accused standing trial that he respond and be expected to be judged on his response when his composure is so taxed and he is unable to appear to the best of his ability. (Yesawich, Televising and Broadcasting Trials, 37 Corn. L. Q. 701, 709, 710 (1952).)

It is essential to the fair conduct of a trial that the participants approach their tasks with an appreciation of the serious and important nature of the hearing. The dignity and austerity of the courtroom and the solemnity of the proceedings should drive this home to them. In a "circus atmosphere" this is impossible.

During the trial petitioner's attorney protested to the judge that

> this courtroom doesn't look like a courtroom to me; it looks like a moving picture theater . . . and this trial has assumed to me a character of proceedings to entertain and instruct the public. . . . The cameras . . . shine out of the booth just as cameras do at a moving picture show . . . It is like the defendants of Perry Mason's. (R. 65)

Canon 35, Canons of Judicial Ethics of the American Bar Association, is especially concerned with this aspect of tele-

vision coverage: "Proceedings in court should be conducted with fitting dignity and decorum. . . . [B]roadcasting or televising of court proceedings detract from the essential dignity of the proceedings . . ." Mr. Justice Douglas has been a severe critic of televised trials from this perspective: "The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization has ever witnessed such a spectacle." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1, 5 (1960).

This loss of dignity may not only affect the outcome of the trial; it also goes against "deep rooted feelings" expressed by this Court that elementary standards of decency and civilization must attend all criminal proceedings. See *Jackson* v. *Denno*, 378 U. S. 369, 385, 386 (1964); *Spano* v. *New York*, 360 U. S. 315, 320, 321 (1959); *Rochin* v. *California*, 342 U. S. 165, 172, 173 (1952).

During the trial, the court-designated representative of the television stations asked, when being examined by petitioner's attorney, "Is television on trial here?" (R. 92) In a sense it was, for as Mr. Justice Douglas has observed, televising a trial

> . . . is not dangerous because it is new. It is dangerous because of the insidious influences which it puts to work in the administration of justice . . . The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth. (Douglas, The Public Trial and the Free Press, *supra*.)

Petitioner's trial demonstrates that those influences are so great as to amount to a denial of due process.

B. *Television coverage of the trial denied petitioner due process of law because the jury could not render a verdict based solely upon the evidence introduced at the trial.*

Mr. Justice Holmes stated that "the theory of our [judicial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907). See also *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961). This admonition becomes meaningless when a trial is allowed to be televised.

Convictions in federal trials have been reversed when ineffective steps were taken by the trial judge to insulate the trial from outside influences. *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962); *Coppedge* v. *United States*, 272 F. 2d 504 (D. C. Cir. 1959). The mere fact that Estes' jurors were instructed to disregard newspaper and television comments on the case (R. 107, 130-131) was also ineffective in light of the overwhelming likelihood of extraneous information reaching jurors through television. The cameras should have been barred in recognition of Justice Jackson's observation that "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . [is known by] all practicing lawyers . . . to be unmitigated fiction.' *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949).

It is difficult to believe that all jurors will not turn on their television sets when they return home from the trial, in spite of the judge's instruction, if only to see how they appeared on the screen. Since the telecast will be edited to fit a limited time period (see R. 72, for an indication of how the film clips were used in this case), it is likely that the portions of the trial replayed will be those of the greatest audience interest. This distortion of the evidence, based

on commercial considerations, serves to emphasize in the juror's mind selected portions of the case, and the impact of the television evidence accordingly will be greater than that of testimony observed at the trial. This danger of distortion cannot be risked if the defendant is to have a fair trial. See Mr. Justice Frankfurter's dissent in *Stroble* v. *California, supra* at 201.

Further, evidence may be ruled inadmissable at the trial without any assurance that the television director will follow the judge's order to "disregard the testimony." Similarly, there is no guarantee that bench conferences, supposedly outside the jury's hearing, will not reach the juror at his home. Again, preliminary examinations held on an issue such as the voluntariness of a confession may be witnessed improperly by the jurors via television.

In order to prevent such situations, a judge could perhaps exercise control over television content but this would saddle him with one more distraction from the main job of conducting the trial. There is no feasible way (short of locking up the jury, which is impractical in a trial of any length) of insuring that the jurors will not watch television, nor is it likely that a juror would admit that he violated the judge's admonition. See *United States* v. *Accardo, supra* at 136; Pye, *supra* at 4. Yet the receipt of evidence by a juror via television has constituted grounds for reversal. *Rideau* v. *Louisiana*, 373 U. S. 723 (1963).

Because television coverage generates added interest in a trial and identifies the participants, members of the jury may be approached by friends and strangers who want to volunteer evidence or just talk the issues over. It has been recognized, however, in federal trials at least, that receipt of otherwise inadmissable extraneous evidence from third persons can result in a mistrial. *Coppedge* v. *United States*, 272 F. 2d 504, 508 (D. C. Cir. 1959).

Television in the courtroom, unlike the press, is not a normal occurrence, and never will be except in cases of great public interest. When it is there, that fact is plain to the jurors. This raises the danger that some jurors will look upon the trial as unusual and consequently believe that a particular verdict is expected of them. Moreover, as in the present case, the decision to televise the trial is often based upon the notoriety of the defendant, thus focusing upon the defendant's overall character and history, matters not properly before the jury.

If a prevailing community attitude, fanned by television publicity, is sensed by the jurors, they may be reluctant to hand down a verdict contrary to public opinion. A juror need only recall the nation-wide television coverage of the polling of the jurors in the Jack Ruby trial to be deterred from rendering what he believes to be a just verdict. See Douglas, *supra* at 9.

Questioning individual jurors as to whether they have been influenced by public opinion would not necessarily prevent this evil. First, a juror might be reluctant, in the face of strong public sentiment, to be the cause of a mistrial by such a declaration. Second, it is not at all clear that the juror is consciously aware of the pressures that bear upon his verdict:

> One cannot assume that the average juror is so endowed with a sense of attachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. (*Delaney v. United States*, 199 F. 2d 107, 112-113 (1st Cir. 1952) (Magruder, *C.J.*).)

Only by excluding television coverage entirely can the judge guard against the influence of public opinion upon the outcome of the trial and the danger that the jury will rule on an improper basis. As Mr. Justice Frankfurter warned, "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury." *Irvin* v. *Dowd*, 366 U. S. 717, 730 (1961) (concurring opinion).

C. *Television coverage of the trial denied petitioner the right to effective counsel.*

In order to protect their client's right to be free from the interference of the television camera, petitioner's attorneys were forced to divert their attention from the merits of the case. They made eight separate and often elaborate motions to eliminate or limit television coverage. (R. 31-34, 53-56, 61-62, 103, 107, 131, 132-133, 134)

Early in the trial Estes' attorney protested to the judge that "motion pictures and the grinding of cameras while I am interrogating or cross-examining witnesses makes it almost impossible for me to give my attention to the case and to properly represent my client." (R. 32) A television technician admitted on examination that one of the cameras was positioned so that an accurate picture could be taken of all papers and documents on the counsel table, as well as of the actions of defendant and his attorney. (R. 44) The possibility of a microphone picking up conferences at the table was also conceded. (R. 49) Further objections were raised by petitioner's attorney (R. 62, 66), and the judge did accede to a request that there be no coverage during defendant's summation. (R. 134) He also indicated that he would correct the situation if it appeared that the attorneys' conversations were being picked up. (R. 49, 50)

In spite of the judge's attempt at corrective measures, the petitioner's attorney was faced with a moral dilemma in conducting the trial:

> To me it is highly distasteful to be forced to defend a man in a criminal case where cameras are trained on me during the trial or any part of the trial. I believe sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the court room. (R. 64)

A defendant's right to counsel is not satisfied "by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932). Although *Powell* and the line of cases culminating in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), dealt primarily with the question of assigned counsel, the rationale of *Powell* applies in a situation in which the aid of retained counsel is rendered ineffective by an action of the state. The record in the present case establishes that the presence of television in the courtroom made it impossible for petitioner's attorneys to provide him with effective assistance.

Telecasting not only hinders attorneys in the conduct of the case, but raises serious possibilities of unethical conduct. As a leading commentator has pointed out (Pye, *supra* at 11):

> The bar has always been regarded as the nursery of political careers. The temptation offered to the elected prosecutor by television coverage is a great one . . . [H]is conduct in the televised trial may be dictated by what the public thinks he should do rather than what he knows is proper. The defense counsel who appreciates that the interests of his client require that he lay back and avoid forensics may be affected by the fact

that television viewers who do not understand his strategy may never seek his services.

In the face of these obstacles to effective representation, it is difficult to see how televised trials comport with the demands of due process.

D. *Television coverage is unfair because it precludes the possibility of a meaningful new trial.*

A vast television audience witnessed the trial of Billie Sol Estes. If this Court vacates the judgment below and remands for a new trial it will be extremely difficult, if not impossible, to select a jury that has not prejudged the outcome by watching the first trial. In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), petitioner's confession was telecast in the local area. Without reviewing the voir dire examination of the jurors, the court held that due process required a trial before a jury "drawn from a community of people who had not seen and heard Rideau's televised 'interview'." 373 U. S. at 727.

Because of the possibility of reversible error or mistrial, every televised case raises the spectre of *Rideau* upon commencement of a second trial. *Rideau* arose on a denial of a motion for a change of venue, leaving open the possibility of a new trial in an area unsaturated by television. But in the present case, and in most "all out publicity" cases, it may be impossible to find a community in which the trial had not been telecast. This point is most dramatically illustrated by the televised shooting of Lee Harvey Oswald and the subsequent trial of Jack Ruby. The practical, and intolerable, result would be that a new trial would have to be held in spite of the exposure condemned in *Rideau* as violative of due process. See the opinions of Mr. Justice Frankfurter, concurring in *Irvin* v. *Dowd*,

supra at 729, and dissenting from the denial of certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 915, 916.

Extensive television exposure of those suspected of crime has been widely condemned. E.g., Television and the Accused, A Report of the Committee on Civil Rights, New York County Lawyers Association; Letter from Seven Harvard Law School Professors to the Editor of the New York Times, Dec. 1, 1963, Sec. 4, p. 10, col. 8. The publicity discussed in those articles was beyond the corrective power of the court. See *Wood* v. *Georgia*, 370 U. S. 375 (1962). When it is within the power of a court to prevent another *Rideau* case, a failure to do so seems inexcusable. A defendant's right to appeal a conviction should not be vitiated by making the possible grant of a new trial a hollow victory. Cf. *Green* v. *United States*, 355 U. S. 184 (1957).

E. *Exclusion of television from the courtroom does not conflict with other constitutionally protected interests.*

Neither the freedom of communication assured by the First Amendment nor the right to a public trial guaranteed by the Sixth Amendment, offers any protection to televised trials. First, this Court "has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press." *Irvin* v. *Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion). Second, the right to a public trial is not infringed by the mere exclusion of technical equipment from the courtroom; the general public, including press and television personnel, is free to attend. This is all that the Sixth Amendment requires. See Radin, The Right to a Public Trial, 4 Temp. L. Q. 381, 391 (1932); 1 Cooley's Constitutional Limitations, p. 647 (8th ed. 1927).

It has been argued, however, that a decision to bar television from the courtroom will curtail freedom of com-

munication because television educates the public and guards against abuses of the judicial process. See, e.g., Monroe, Remarks, Conference of the National Civil Liberties Clearing House, Washington, D. C., March 20, 1964. Wiggins, *supra*, at 839. But the press serves both these purposes and does so without the impediments to a fair trial necessarily associated with live telecasts.

Most abuses of the judicial process, such as illegal searches, coerced confession and deprivation of counsel take place before trial, and television coverage would have no effect on them. At the trial itself, the court, counsel and the press insure a fair hearing to both sides. The presence of television personnel and a home audience could hardly provide further safeguards; indeed, only those trials which are heavily attended and carefully observed would receive television publicity.

Press coverage, it should be pointed out, presents none of the threats of televised trials. The physical presence of newsmen cannot affect the course of the proceedings, as must a battery of television equipment. Nor does a newspaper have the deep psychological effect that television has on a juror who sees a telecast afterwards. See Television and the Accused, A Report of the Committee on Civil Rights, New York County Lawyers Association, p. 3. The abuses of press coverage generally arise before the trial and can be corrected by inquiry on the voir dire, a change of venue, or a postponement of the trial. The effects are not as severe since, unlike the telecast, their impact is not felt during the trial at the point of greatest sensitivity. And, since press coverage is generally not as pervasive as a network telecast, there is not nearly the same risk that it will taint a new trial if one should become necessary.

II.

In permitting television coverage of the petitioner's trial the trial court deprived him of the equal protection of the laws.

Although television is a news medium, commercial necessities dictate that only the rare case will receive the extensive coverage given petitioner. In fact, most cases would probably not be televised at all. See *Tinkham, supra* at 884, 885. Telecasts require sponsors, and sponsors want only those presentations which generate the greatest public interest. The Estes trial, carried live the first day of the proceedings and later that evening, had at least fifteen different sponsors (R. 84-88)—the sponsors for the normally scheduled program for the particular time. It is unlikely they would consent to the substitution of a program of lesser interest.

This fact of commercial life introduces an invidious distinction between those defendants who may or may not be subjected to the abusive practices discussed in Part I of this brief. Since those pressures may actually determine the outcome of the trial, a defendant's fate turns on the accident of his being a public figure or becoming involved in a cause célèbre. When the quality of justice turns on such an irrelevant distinction, state participation in the wrong denies the defendant equal protection of the laws.

It has been held that "when the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942). The need for equal justice was affirmed in *Griffin v. Illinois*, 351 U. S. 12, 16 (1956), for "weak and

powerful alike." The same reasoning should apply when the famous or infamous are singled out for spectacular and prejudicial treatment by the television industry and the practice is condoned by the trial court.

CONCLUSION

For the reasons stated above, the judgment should be reversed.

Respectfully submitted.

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